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In the Supreme Court of the United States

OCTOBER TERM, 1980

BEVERLY MORROW, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF JANE ELLEN MORROW AND JAMES ANDREW MORROW, AND JOHN PATRICK MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the procedures employed by the Law Enforcement Assistance Administration (LEAA) afford claimants for death benefits under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. (& Supp. III) 3796 *et seq.*, an adequate opportunity to respond to adverse evidence received after the conclusion of the oral hearing on their claim.

2. Whether in denying petitioners' claim the LEAA followed a regulation requiring that any reasonable doubt be resolved in favor of the claimant.

3. Whether the denial of petitioners' claim was predicated upon an erroneous interpretation of one of the governing regulations.

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-8) is reported at 647 F. 2d 1099. The decision of the Law Enforcement Assistance Administration (LEAA) hearing officer denying petitioners' request for reconsideration is reprinted at Pet. App. A-16 to A-29.

JURISDICTION

The judgment of the Court of Claims was entered on April 22, 1981. The petition for a writ of certiorari was filed on July 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. The Public Safety Officers' Benefits Act of 1976 (PSOBA), 42 U.S.C. (& Supp. III) 3796 *et seq.*, provides for the payment of a $50,000 death benefit to the survivors of

any "public safety officer [who] has died as the direct and proximate result of a personal injury sustained in the line of duty * * *." 42 U.S.C. (& Supp. III) 3796. Under regulations promulgated by the Law Enforcement Assistance Administration (LEAA), a "[p]ersonal injury" is defined as a "traumatic injury" or a disease resulting from such an injury, but not an "occupational disease[]." 28 C.F.R. 32.2(e). A "traumatic injury," in turn, is defined to include a bodily condition caused by "climatic conditions," such as "dense smoke." 28 C.F.R. 32.2(f); 42 Fed. Reg. 23260 (1977). The effects of "stress and strain," however, are expressly excluded from coverage (*ibid.*).

The regulations also provide that an injury is a "[d]irect and proximate" cause of death if it is a "substantial factor" leading to death (28 C.F.R. 32.2(d)), and LEAA has determined that an injury will be considered a "substantial factor" if the injury alone is sufficient to kill an officer, regardless of health, or if the injury contributes to the officer's death as much as any other factor, such as a pre-existing disease. PSOBA Legal Opinion No. 77-6 (Pet. App. A-31). A claimant bears the burden of showing that an injury was a "substantial factor" in the officer's death (42 Fed. Reg. 23260 (1977)), but the regulations also provide that "any reasonable doubt arising from the circumstances of the officer's death" must be resolved in the claimant's favor. 28 C.F.R. 32.4.

When a PSOBA claim is filed, LEAA procedures require that the file be submitted to a forensic pathologist for review and that the opinion of other pathologists and cardiologists be solicited "if appropriate." 42 Fed. Reg. 23260 (1977). If the claim is denied, the claimant may request an oral hearing and may submit evidence relevant to eligibility. 28 C.F.R. 32.24(a) and (c). The hearing officer is required to receive all relevant evidence proffered by the claimant, as well as "such other evidence as the hearing officer may

determine to be necessary or useful in evaluating the claim." 28 C.F.R. 32.24(c). See also 28 C.F.R. 32.21(a). The hearing officer is authorized to reopen the hearing at any time prior to decision for the receipt of additional relevant and material evidence. 28 C.F.R. 32.24(e). If the hearing officer determines that a claimant is ineligible, the claimant may obtain review of that determination by the LEAA Administrator. 28 C.F.R. 32.24(a).

2. On October 8, 1976, John C. Morrow, a firefighter in Evansville, Indiana, became ill after inhaling smoke while fighting a house fire. After a short period, he resumed fighting the fire and then returned to the fire station and collapsed. He was taken to a nearby hospital, where his condition was diagnosed as cardiac arrest. He remained hospitalized for three and one-half weeks before being discharged. On November 16, he was readmitted after suffering severe chest pains at home, and he died in the hospital four days later (Pet. App. A-4 to A-5). An autopsy revealed evidence of an earlier, healed myocardial infarction, and resulted in a diagnosis of marked atherosclerotic heart disease (R. 137).[1] The death certificate listed the immediate cause of death as cardiac arrest due to myocardial infarction (R. 136).

Petitioners, who are Morrow's wife and children, then filed a claim for PSOBA benefits. LEAA sent the medical information in the file to a forensic pathologist, Dr. Robert L. Thompson of Walter Reed Hospital, who concluded that Morrow's death had resulted, not from a traumatic injury, but from an "acute myocardial infarct secondary to arteriosclerotic heart disease" (R. 144). LEAA then issued its initial determination of ineligibility, in which it concluded that Morrow's smoke inhalation was not a substantial factor in his fatal heart attack and that the "overriding factor in

[1] "R" refers to the administrative record.

his death was his severe underlying heart disease" (R. 134-135). Petitioners requested reconsideration of the denial, and an oral hearing was held. At the hearing, petitioners objected to the consideration of reports by physicians who had not treated Morrow, but they did not seek to subpoena Dr. Thompson or the pathologist who performed the autopsy (R. 75-77). Following the hearing, the record was held open for the receipt of additional evidence submitted by petitioners (R. 29-33, 46-63), as well as additional analyses by two medical advisers and a chemical expert whose views were solicited by the hearing officer (Pet. App. A-5; R. 23, 26, 40).

The hearing officer subsequently issued a decision (Pet. App. A-16 to A-29) denying benefits and finding that there was no reasonable doubt that a traumatic injury incurred during the fire had not been a substantial factor in Morrow's death (*id.* at A-27). At petitioners' request, their claim was reviewed by the LEAA Administrator, who adopted the hearing officer's decision as the final agency action (Pet. App. A-7; R.1).

Petitioners then filed suit in the Court of Claims under the Tucker Act, 28 U.S.C. (& Supp. III) 1491. The court granted summary judgment in favor of the government (Pet. App. A-1 to A-8). It found that there was no reasonable doubt that smoke inhalation had not been a " 'substantial factor' " in Morrow's death "under any plausible construction of the term ['substantial factor']" (*id.* at A-7 n.4) and held that petitioners' constitutional claims were "without substance" (*id.* at A-8 n.5).

ARGUMENT

Petitioners seek review of the denial of their claim for benefits on various grounds. Their arguments, however, are based upon a clear misreading of the relevant regulations and the decision below. Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 10-18) is that the procedures used by the LEAA to determine eligibility for PSOBA benefits violate due process because they permit the hearing officer to solicit and receive medical reports and other evidence after the conclusion of the oral hearing (28 C.F.R. 32.24(e)) but do not afford claimants a meaningful opportunity to respond to adverse evidence received at that time. In fact, however, such an opportunity is and always has been provided.

When the hearing officer determines that benefits should be denied, a claimant has always been able to obtain review by the LEAA Administrator and to submit new evidence or advance new arguments. At the time when petitioners sought review by the Administrator, the commentary to the regulation governing review, 28 C.F.R. 32.24, stated that the review process was "informal and expedited" and was "intended to minimize the financial and logistical burden on the claimant, *yet provide a fair hearing of his views.*" 42 Fed. Reg. 23261 (1977) (emphasis added). Since then, the regulation itself has been amended to provide that a claimant seeking review by the Administrator can "[c]omment on the record, and offer new evidence or argument on the issues in controversy." 28 C.F.R. 32.24(i)(2). This amendment did not afford claimants new rights but was promulgated "to conform to the agency's actual practice." 45 Fed. Reg. 16180 (1980).

Thus, petitioners had the opportunity to respond to the evidence received by the hearing officer after the conclusion of the oral hearing,[2] but they did not do so. They were given

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[2]Petitioners contend (Pet. 10-18) that the decision below conflicts with the following decisions of this Court concerning due process rights: *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Morgan* v. *United States*, 304 U.S. 1 (1938); and *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937). But since their arguments are

"the opportunity to be heard 'at a meaningful time and in a meaningful manner' " (*Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)), and, consequently, their right to due process was not denied.[3]

2. Petitioners also argue (Pet. 18-22) that LEAA failed to follow its own regulation requiring that "any reasonable doubt arising from the circumstances of the officer's death" be resolved in the claimants favor. 28 C.F.R. 32.4. They contend (Pet. 20) that the Court of Claims recognized that a reasonable doubt existed in this case. Petitioners, however, have simply misread the court's opinion.

After noting petitioners' argument, the Court of Claims remarked:

> The allegation, relating to the agency's finding upon the issue of proximate causation, is again without foundation. There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence. The obvious and overwhelming cause of death was heart disease—pre-existing, prolonged, and degenerative.

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predicated upon the erroneous assertion that they had no opportunity to respond to evidence received after the oral hearing, a discussion of these cases is unnecessary.

Petitioners also maintain (Pet. 12) that the decision below conflicts with several decisions of the courts of appeals holding that the denial of Social Security disability benefits is unjustified when supported only by the opinion of a single physician who did not treat the claimant and when all the other evidence was to the contrary. Those cases are inapposite here, however, because LEAA's decision was supported, not only by the reports of experts who reviewed the file, but also by the findings of the pathologist who performed the autopsy.

[3]Petitioners suggest (Pet. 8, 13) that the experts whose reports were solicited by the hearing officer after the oral hearing were not furnished with copies of petitioners' post-hearing evidence. The record, however, refutes this claim (see R. 26, 40).

(Pet. App. A-8) (emphasis in original) (footnote omitted).

Petitioners interpret (Pet. 20) the court's statement—" 'There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence' "—to mean that a reasonable doubt existed. When that sentence is read in context, however, it is clear that the court meant precisely the opposite, *i.e.*, that any contention that the smoke inhalation substantially contributed to Morrow's death would be unreasonable. Thus, even under the lenient standard in 28 C.F.R. 32.4, petitioners did not qualify for death benefits.[4]

3. Finally, petitioners contend (Pet. 22-25) that LEAA has adopted an erroneous definition of the term " 'substantial factor,' " which is used in 28 C.F.R. 32.2(d) to define the statutory phrase "direct and proximate result." 42 U.S.C. (& Supp. III) 3796(a). In a legal opinion, LEAA's general counsel has stated that an injury should be considered a " 'substantial factor' in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death[;] or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive disease." PSOBA Legal Opinion No. 77-6 (Pet. App. A-31).

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[4]Petitioners focus (Pet. 19) upon a portion of the opinion of the lay hearing officer (Pet. App. A-27) that appears to rely upon the standard of review applicable when a final agency action is reviewed in court, *i.e.*, whether the agency's action is supported by substantial evidence (see 5 U.S.C. 706(2)(E)). But even if the hearing officer erroneously believed that the standard was relevant to the proceedings before her, her error did not affect the decision, because she also applied (Pet. App. A-27) the correct standard set out in 28 C.F.R. 32.4 and found that there was no reasonable doubt that a traumatic injury had not caused Morrow's death. Furthermore, as noted above, the Court of Claims clearly applied the correct standard and reached the same conclusion (Pet. App. A-8).

LEAA relied upon this definition of " 'substantial factor' " in denying petitioners' claim (Pet. App. A-19 to A-20), but the Court of Claims did not. The court described that definition as "somewhat cramped,"[5] but held that it need not resolve the question because "we do not believe that claimants herein can prevail under any plausible construction of the term" (*id.* at A-7 n.4). Thus, the denial of petitioners' claim did not result from the LEAA's interpretation, and review of the correctness of that interpretation is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Despite this criticism, LEAA's interpretation of its own regulation is clearly valid. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

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